

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
VONAGE HOLDINGS)	
CORPORATION)	
)	WC Docket No. 03-211
Petition for Declaratory Ruling)	
Concerning an Order of the Minnesota)	
Public Utilities Commission)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. (“Qwest”) hereby files these comments on the Petition for Declaratory Ruling filed by Vonage Holdings Corporation (“Vonage”).¹ Vonage asks the Federal Communications Commission (“Commission”) to declare that the State of Minnesota is preempted from regulating Vonage as an intrastate telephone company. Vonage’s petition was prompted by a ruling by the Minnesota Public Utilities Commission (“PUC”) that Vonage’s service constituted “telephone service” within the meaning of Minnesota law, and thus was subject to regulation by the PUC. Vonage’s petition seeks federal nullification of that decision.

After filing its Petition for Declaratory Ruling with the Commission, Vonage filed a motion for preliminary injunction with the United States District Court for the District of Minnesota. That Court recently issued a Memorandum and Order finding that Vonage’s service

¹ See Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission of Vonage Holdings Corporation, filed Sept. 22, 2003 (“petition”); *Public Notice*, Pleading Cycle Established for Comments on Vonage Petition for Declaratory Ruling, WC Docket No. 03-211, DA 03-2952, rel. Sept. 26, 2003.

is an information service and permanently enjoining the PUC from enforcing its ruling.² Thus, the District Court's Memorandum and Order has mooted Vonage's Petition for a Declaratory Ruling.

Despite the fact that Vonage's petition is moot, it is vital that the Commission act expeditiously to resolve the legal and regulatory issues related to Internet Protocol ("IP") voice offerings. The District Court's decision makes Commission action all the more urgent because delay by the Commission in deciding critical regulatory issues can result in the federal courts preempting the Commission's regulatory role.³ The questions relating to regulation of IP voice service are pressing ones that the Commission must address immediately for the entire telecommunications sector, rather than just for Vonage as an individual service provider.

However, a declaratory ruling is not the proper vehicle by which to address the multitude of issues raised by Vonage in its petition and by the increase of IP voice technology in general. A declaratory ruling is used to terminate a controversy or remove uncertainty,⁴ not to amend old rules or to enact new ones. As a general principle, a declaratory ruling is appropriate only when the facts of a controversy are "clearly developed and essentially undisputed."⁵ Vonage's petition seeks to procure a modification of the Commission's existing rules under the guise of seeking a clarification. This is clearly not an appropriate use of the declaratory ruling process. The U.S.

² See *Vonage Holdings Corporation v. The Minnesota Public Utilities Commission, et al.*, Civil No. 03-5287 (MJD/JGL), Memorandum and Order (D. Minn. Oct. 16, 2003).

³ See, e.g., *Brand X Internet Services, Inc. v. FCC*, --- F.3d ---, 2003 U.S. App. LEXIS 20306 (9th Cir. Oct. 6, 2003).

⁴ 47 C.F.R. § 1.2.

⁵ *In the Matter of American Network, Inc. Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, Memorandum Opinion and Order, 4 FCC Rcd 550, 551 ¶ 18 (Com.Car.Bur. 1989).

Court of Appeals for the District of Columbia Circuit summarized the proper approach to the Vonage petition in a different context in *Sprint Corporation v. FCC*:

Underlying these general principles is a distinction between rulemaking and a clarification of an existing rule. Whereas a clarification may be embodied in an interpretative rule that is exempt from notice and comment requirements, . . . new rules that work substantive changes in prior regulations are subject to the APA's procedures. Thus, in *National Family Planning & Reproductive Health Ass'n v. Sullivan*, the court described as "a maxim of administrative law" the proposition that, "if a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative."'⁶

Chairman Powell has stated that his goal is to start from the "cleanest slate possible" for voice over IP service, to come up with "the right regulations for this service."⁷ Qwest agrees. Qwest believes IP voice services should not be made to fit into the existing rules and classifications, many of which were developed before IP technology was ever dreamed of in its current form. Accordingly, even if Vonage's petition were not moot, a rulemaking addressing the multiplicity of IP voice issues (carrier's carrier charges, 911, number portability, Universal Service, etc.) would be the best means for the Commission to acquire all of the relevant facts and then to reach a balanced decision as to "the right regulations for this service." These issues are

⁶ *Sprint Corporation v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (citing *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993)).

⁷ *TR Daily*, October 14, 2003.

vital to the telecommunications industry. Qwest recommends that the Commission address them in a rulemaking without delay.

Respectfully submitted,

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October 27, 2003

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL, INC.** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served via e-mail on the FCC staff persons identified on the attached service list and on the FCC's duplicating contractor, Qualex International, Inc. and 3) served via First Class United States mail, postage prepaid, on counsel for Vonage Holdings Corporation, as indicated on the attached service list.

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